

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0478**

State of Minnesota,
Respondent,

vs.

Jared Devlin Johnson,
Appellant.

**Filed January 17, 2023
Affirmed in part, reversed in part, and remanded
Kirk, Judge***

Dakota County District Court
File No. 19HA-CR-19-3391

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn M. Keena, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reyes, Judge; and Kirk, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant challenges his sentence, arguing that the district court used an incorrect criminal-history score and abused its discretion by denying a downward dispositional departure. We affirm in part, reverse in part, and remand for resentencing with the correct criminal-history score.

FACTS

Appellant Jared Devlin Johnson pleaded guilty to three counts of using a minor in a sexual performance or pornographic work, in violation of Minn. Stat. § 617.246, subd. 2 (2018). In January 2022, the district court denied Johnson’s motion for a downward dispositional departure and sentenced him separately for each count, using the *Hernandez* method. *See State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981) (allowing the district court to sentence separate and distinct convictions sequentially); *see also* Minn. Sent’g Guidelines 2.B.1.e (2018 & Supp. 2019) (same). For the final count sentenced, the district court imposed a 78-month executed prison sentence. Johnson appeals.

DECISION

I. Johnson is entitled to resentencing with the correct criminal-history score.

A district court “must use accurate criminal history scores in order to set mandatory presumptive sentences that comply with the Minnesota Sentencing Guidelines.” *State v. Maurstad*, 733 N.W.2d 141, 142 (Minn. 2007). Thus, “any sentence based on an incorrect criminal history score is an illegal sentence.” *State v. Provost*, 901 N.W.2d 199, 201 (Minn. App. 2017) (quotation omitted).

The parties agree that Johnson is entitled to resentencing pursuant to the Minnesota Supreme Court's decision in *State v. Robinette*, 964 N.W.2d 143 (Minn. 2021). In *Robinette*, the supreme court held that a defendant who was sentenced after the 2019 sentencing guidelines were modified is entitled to be sentenced pursuant to less punitive provisions of those modifications. *Id.* at 151. We agree that Johnson is entitled to resentencing pursuant to the 2019 sentencing guidelines.

The 2018 sentencing guidelines included prior misdemeanor and gross-misdemeanor convictions in a criminal-history score if less than ten years had elapsed since the "expiration of the sentence and the date of the current offense." Minn. Sent'g Guidelines 2.B.3.e (2018). This provision was modified in the 2019 sentencing guidelines to begin the ten-year decay period on "the date of the initial sentence following the prior conviction." *Id.* (Supp. 2019).

The sentencing worksheet, on which the district court relied, assigned Johnson four criminal-history points, one of which was based on four prior misdemeanor and gross-misdemeanor convictions. *See* Minn. Sent'g Guidelines 2.B.3 (2018) (assigning one criminal-history point for four prior misdemeanor or gross-misdemeanor convictions). For two of these convictions, Johnson was sentenced to a stay of imposition in 2007, and the sentence expired in December 2012. When Johnson was sentenced in January 2022, these two convictions would have decayed pursuant to the 2019 sentencing guidelines, but not the 2018 sentencing guidelines. And without these two convictions, Johnson would not have been assigned a criminal-history point for prior misdemeanor or gross-misdemeanor convictions, and his criminal-history score would have been three, not four when being

sentenced for the third count. *See id.* (Supp. 2019) (“[G]ive no partial point for fewer than four [misdemeanor and gross misdemeanor convictions].”). Using the correct criminal-history score of three, Johnson’s presumptive sentencing range would have been 51-72 months, which is less punitive than his 78-month sentence. Minn. Sent’g Guidelines 4.B (Supp. 2019).

Therefore, we reverse and remand to the district court for resentencing pursuant to the 2019 sentencing guidelines.

II. The district court’s denial of a downward dispositional departure was within its discretion.

“The district court must order the presumptive sentence provided in the sentencing guidelines unless substantial and compelling circumstances warrant a departure.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted). We will affirm a presumptive sentence if “the record shows that the sentencing court carefully evaluated all the testimony and information presented,” even if reasons for a departure exist. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013); *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a “rare” case will we reverse the district court’s refusal to depart from a presumptive sentence. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)).

At Johnson’s sentencing hearing, the author of Johnson’s presentence-investigation report (PSI) testified, attorneys for the state and Johnson presented arguments, and Johnson made a statement. The district court recessed to review the information and make a

decision. When it returned, the district court discussed the seriousness of the crime and its impact on the victim and noted that it had reviewed all the information, including the PSI, letters of support for Johnson, recommendations from sex-offender treatment, and arguments from counsel.

Thus, the record amply demonstrates that the district court “carefully evaluated all the testimony and information presented,” and we will not reverse the district court’s sound exercise of its discretion in denying Johnson a downward dispositional departure. *Johnson*, 831 N.W.2d at 925 (quotation omitted).

Affirmed in part, reversed in part, and remanded.